UNITED ENGINEERS (MALAYSIA) BHD

v.

SEOW BOON CHENG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[ORIGINATING SUMMONS NO: 24-306-2000]
22 MARCH 2001

CIVIL PROCEDURE: *Receiver - Appointment - Application made ex parte - Whether null and void - Whether there was non-compliance with O. 30 r. 1 Rules of the High Court - Whether application should be made inter partes instead*

COMPANY LAW: *Receivership - Appointment of receiver - Derivative action - Plaintiff a majority shareholder - Whether plaintiff has locus standi to bring in action - 'Proper plaintiff rule' in Foss v. Harbottle - Whether plaintiff falls under the exception*

CIVIL PROCEDURE: *Locus standi - Plaintiff a majority shareholder - Whether plaintiff has locus standi to institute derivative action - Whether 'proper plaintiff rule' in Foss v. Harbottle applicable*

The plaintiff was a shareholder of the 2nd defendant. It was the plaintiff's stand that the 1st defendant had failed to act in the interest of the 2nd defendant in exercising his duties and powers as a director of the 2nd defendant. The plaintiff filed an *ex parte* summons in chambers pursuant to O. 30 r. 1 of the Rules of the High Court 1980 ('the Rules') and prayed for the appointment of receivers and managers to receive and manage the affairs and properties of the 2nd defendant. It was allowed and the order sought for was granted.

The 1st defendant now filed an appeal and prayed that the said *ex parte* order be struck out with costs because it was null and void on the following grounds; (i) there was non-compliance of O. 30 r. 1 of the Rules; and (ii) the plaintiff as majority shareholder had no *locus standi* to bring in a derivative action.

Held:

[1] The words "until after the hearing of a summons for the appointment of receiver" found in O. 30 r. 1(4) denotes that such an application has to be made *inter partes*. Thus, an application for the appointment of a receiver made pursuant to O. 30 r. 1 of the rules must be made *inter partes* and not *ex parte* as in the instant case.

[2] The proper party to bring an action to remedy the wrongs that the 1st defendant had allegedly committed would be the 2nd defendant. It is the 2nd defendant which has to determine what steps it has to take to overcome or prevent the acts complained of against the 1st defendant. Furthermore, the plaintiff being the majority shareholder did not fall within any of the exceptions of the 'proper plaintiff rule' in *Foss v. Harbottle* and hence would not be in a position to bring in a derivative action.

[Ex parte order set aside.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 ***(refd)***

Bond Brewing Holdings Ltd & Ors v. National Australia Bank Ltd & Ors [1989-1990] 1 ACSR 445 ***(refd)***

Datuk M Kayveas v. PV Das (for himself and on behalf of People's Progressive Party of Malaysia) [1997] 4 CLJ 544 ***(refd)***

Duffy v. Super Centre Development Corp Ltd [1967] 1 NSWR 382 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Hwang Ju-In v. Huang Han Chao [1977] 2 MLJ 229 ***(refd)***

In re H's Estate [1875] 1 Ch D 276 ***(refd)***

In re Pountain [1887] 37 Ch D 609 ***(refd)***

Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***

Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881 ***(refd)***

Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng [1947] 13 MLJ 174 ***(refd)***

Shaik Lebbai Maricar v. Hj Mohamed Eusope & Ors [1929] SSLR 141 ***(refd)***

Walbrook & Co v. Jones & Lewis [1887] 3 TLR 609 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 132(1), 132C(1), (2), (5), 144(1), (3), 169

Rules of the High Court, O. 29 r. 1(2B), O. 30 rr. 1(1), (2), (3), (4), 2, 3, 4, 6, O. 83 r. 2(4)

Other source(s) referred to:

Company Law, Walter Woon's, 2nd edn, pp 317, 325

For the plaintiff - Tan Sri Dato' Zaki Azmi (Harjinder Kaur with him); M/s Rashid & Lee

For the 1st defendant - Mohamed Zaini Hj Mazlan (Gideon Tan with him); M/s Gideon Tan Razali Zaini

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Ghazali J:

The plaintiff is a shareholder of the 2nd defendant and the 1st defendant is a director of the 2nd defendant. On 8 December 2000 the plaintiff, which claim is bringing this action in its representative capacity and for the benefit of the 2nd defendant, filed this originating summons praying for the following orders:

(i) a declaration that the 1st defendant has breached his fiduciary duty as a director of the 2nd defendant;

(ii) an injunction to restrain the 1st defendant whether by himself, his officers, servants, agents, nominees or howsoever otherwise from preparing and/or signing and/or causing the signing of any cheques of the 2nd defendant;

(iii) an injunction to restrain the 1st defendant whether by himself, his officers, servants, agents, nominees or howsoever otherwise from disposing or dealing with any property of the 2nd defendant:

(iv) an order directing the 1st defendant to return all monies used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the 2nd defendant;

(v) an order directing the 1st defendant of return all properties used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the 2nd defendant;

(vi) an order that the plaintiff be at liberty to enforce and/or execute on any order made hereunder:

(vii) an order that the 2nd defendant indemnifies the plaintiff for costs of the action;

(vi) costs; and

(ix) such further and other orders as the court deems fit.

The grounds forwarded for filing the originating summons are as follows:

(a) two of the directors of the 2nd defendant in conducting a review on the 2nd defendant have discovered numerous discrepancies and irregularities in the management of the 2nd defendant;

(b) the said two directors have made several inquiries to the 1st defendant to clarify these irregularities but the 1st defendant has failed or refused to clarify the issues;

(c) the 1st defendant has side-stepped and wilfully refused to clarify the issues even in the light of the several discrepancies and irregularities pointed out by the said two directors;

(d) the plaintiff is concerned that monies belonging to the 2nd defendant are unaccounted for and no explanations have been given for the discrepancies in the accounts of the 2nd defendant although numerous requests have been made for the same;

(e) the plaintiff as a shareholder of the 2nd defendant is concerned with any potential claims against the 2nd defendant.

On 3 January 2001 the plaintiff filed an *ex parte* summons in chambers (encl. 5) and prayed for, *inter alia*, the following orders:

(1) That one Kenneth Teh Kiam and one Gong Wee Ning of Pricewaterhouse Coopers or some other fit and proper person or persons, without security, jointly and severally be appointed as receivers and managers to receive and manage the affairs and properties of the 2nd defendant and submit all accounts to the relevant bodies and to do, *inter alia*, one or more of the following:

(i) to appoint auditors and accountants to carry out the internal and external audits on the 2nd defendant and to take all necessary steps to requlatise the 2nd defendant's accounts in relation to a project that is being undertaken by the 2nd defendant, namely, the Telekom project ("the said Telekom project");

(ii) to take possession, control, custody and to get in to the business address and the registered office and any other offices of the 2nd defendant and to take possession, control custody of and to get in, receive and store all assets, properties and effects of business, monies, stock in trade, securities, deeds, books and documents in relation to the 2nd defendant;

(iii) to carry out as the receivers and managers deem fit any work on the said Telekom project and in general to do all such things as may be necessary for the completion of that project so far as it is possible;

(iv) so far as it is possible to complete the mechanical and engineering works carried out by the 2nd defendant in the said Telekom project;

(v) to ensure that all sub-contractors and suppliers of the 2nd defendant carry out their obligations.

The facts leading to the application as stated in the plaintiff's affidavit in support are as follows:

(1) On 2 November 1993 the plaintiff and Genisys Integrated Pte Ltd, a company incorporated in Singapore ("Genisys") entered into a shareholders agreement ("the said agreement") wherein they agreed to form and incorporate a joint venture company called UEM Genisys Sdn Bhd, ie, the 2nd defendant.

(2) Pursuant to the said agreement it was agreed that the plaintiff shall hold 51% and Genisys shall hold 49% of the shareholding of the 2nd defendant.

(3) Pursuant to the said agreement the plaintiff was to nominate two directors and Genisys was to nominate two directors respectively to the board of directors of the 2nd defendant.

(4) It was a term of the said agreement that the day to day management of the 2nd defendant is assigned to the 1st defendant.

The above terms of the said agreement were carried out and the 2nd defendant went about its business. The plaintiff had nominated one Sulaihah Maimunni and one Mohd Zaki Hamdan and Genisys had nominated the 1st defendant and one Soh Lup Chee respectively to sit on the board of the 2nd defendant.

Between October 1998 to the middle of the year 2000, there were negotiations between the plaintiff and the 1st defendant representing Genisys whereby the plaintiff made an offer to sell the shares held by the plaintiff in the 2nd defendant to Genisys. The proposed offer to sell and purchase could not materialise due to the non agreement of the terms of a bank guarantee that the plaintiff has requested the 1st defendant to furnish and the final offer by the plaintiff subsequently lapsed.

It is the plaintiff's case that the 2nd defendant had last filed its audited accounts for the financial year ended 31 December 1998 but thereafter failed to prepare any statement of accounts and the plaintiff is unaware of the actual status of the accounts of the 2nd defendant. From early 1999 the plaintiff has sent several memorandum and letters to the 2nd defendant requesting the latter to forward its monthly management reports to the plaintiff to enable the plaintiff to prepare group reports, the plaintiff being a public listed company and the 2nd defendant being a subsidiary of the plaintiff, but met with little response. In July 2000, representatives from the audit department of the plaintiff headed by one Amir Fizal Hamzah had on three occasions attempted to conduct an internal audit at the business address of the 2nd defendant but was denied access by its finance manager, one Azni Amran on the instructions of the 1st defendant. The plaintiff pointed out to the 2nd defendant that

pursuant to cl. 11.3 of the said agreement, the directors of the 2nd defendant are to have full access to the books of accounts and other records of the 2nd defendant. The two said directors of the 2nd defendant nominated by the plaintiff, *viz*., Sulaihah Maimunni and Mohd Zaki Hamdan consequently signed a letter of authorisation authorising and delegating their powers to the said Amir Fizal Hamzah to access and review the books of accounts. By letter dated 3 August 2000 the 1st defendant as managing director of Genisys informed the plaintiff that the internal audit department of the plaintiff is not entitled to have access to the accounts of the 2nd defendant and that only the directors of the 2nd defendant were allowed such access.

Later, also in the month of August 2000, four further attempts to do the same were made by the said Sulaihah Maimunni and Mohd Zaki Hamdan together with the said Amir Fizal Hamzah. On these occasions the response was slightly better. However they were only allowed to conduct a review of certain documents. The 1st defendant was not fully co-operative and had refused the documents they requested for. Later in the month, at a meeting of the board of directors held on 25 August 2000, it was resolved, *inter alia*, that the said Azni Amran, the finance manager of the 2nd defendant is removed as a cheque signatory of the 2nd defendant. On 6 September 2000 Genisys, in a separate suit, obtained an interlocutory injunction restraining the plaintiff, the 2nd defendant and its directors and company secretary from implementing, acting upon, enforcing affecting or purporting to implement, act upon, enforce or give effect to the resolutions passed at the board of directors meeting held on 25 August 2000.

On 9 September 2000 the 1st defendant lodged a police report against the said Azni Amran stating therein that Azni Amran had admitted taking a sum of RM250,000 and a sum of RM125,000 on 4 April 2000 and 25 May 2000 respectively from the 2nd defendant. On 15 September 2000 the said Sulaihah Maimunni lodged a police report against the said Azni Amran in relation to certain discoveries made during her review of the documents of the 2nd defendant. On the same date the said Sulaihah Maimunni and Mohd Zaki Hamdan lodged another police report in relation to the issuance of a cash cheque in the sum of RM50,000 to one Elton Sun Kim Cheng, an ex-employee of the 2nd defendant. Prior to this, the said Sulaihah Maimunni had written to the 1st defendant requesting clarification of, *inter alia*, the said cash cheque of RM50,000 but up to date there was no response.

The plaintiff has been awarded the mechanical and engineering works ("the said works") in the said Telekom project from the main contractor, namely, DPJV pursuant to two letters of award dated 20 June 1996. Since the said works have been undertaken by the 2nd defendant on behalf of the plaintiff,

documentation relating the said Telekom project is retained at the 2nd defendant's office. The 2nd defendant, having undertaken the said works on behalf of the plaintiff, has in turn engaged sub-contractors to supply goods and to carry out the said works. The sub-contractors have now brought to the attention of the plaintiff that they have not been paid for a substantial amount of the work they have carried out for the 2nd defendant although they have made claims and requests for payment from the 1st defendant.

The plaintiff stated it has retained progress payment in the sum of RM9 million received from the employer, Telekom Berhad and the plaintiff has not made payment to the 2nd defendant as the plaintiff wishes to ensure that payments are made to the sub-contractors or to procure the court-appointed receivers and managers to do the same. The plaintiff is concerned that if this progress payment in the sum of RM9 million is given to the 2nd defendant, the 1st defendant may use these funds for his own personal use as he may have previously done and not make payments to the sub-contractors. The plaintiff is also concerned of the risk of legal proceedings against the 2nd defendant by the sub-contractors for non-payment for work carried out and for goods delivered. It is the plaintiff's stand that the 1st defendant has clearly failed to act in the interest of the 2nd defendant in exercising his duties and powers of a director of the 2nd defendant and an appointment of receivers and managers will solve this problem as such receivers and managers will be able to make all necessary payments to the sub-contractors and investigate into any irregularities in the 2nd defendant.

The plaintiff stress there is great concern about the way the affairs of the 2nd defendant is being run by the 1st defendant and accordingly there is a need for the appointment of receivers and managers immediately to regularise any possible irregularities in the 2nd defendant. It is also their contention that the defendant as director of the 2nd defendant has clearly not taken into consideration the interests of the 2nd defendant in his actions as a director of the 2nd defendant.

At the hearing of the *ex parte* application (encl. 5), counsel for the plaintiff explained the application is made pursuant to O. 30 r. 1 of the Rules of the High Court 1980 ("the rules"). Order 30 r. 1 of the rules which is entitled "receivers" read:

> (1) An application for the appointment of a receiver may be made by summons or motion.
>
> (2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such an order.

(3) Where the applicant wishes to apply for the immediate grant of such injunction, he may do so *ex parte* by summons supported by an affidavit.

(4) The court hearing an application under para. (3) may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons returnable on such date as the court may direct, to be issued.

Counsel explained the plaintiff has brought what is known as a "derivative action". He submitted the general principle is that a member/shareholder may not sue to enforce a company's rights, ie, the "proper plaintiff rule". He then referred to chapter 9 of Walter Woon's *Company Law* (2nd edn) entitled "Enforcement of Corporate Rights" at p. 317 which read:

> A company is an entity separate from its members. Because of this, a member may not sue to enforce a company's rights. Thus, if a contracting party does not perform a contract made with the company, it is for the company to sue; if a director breaches his duty to the company, only the company has the right to sue. A member cannot sue on the company's behalf in such situations. This rule is know as the 'proper plaintiff rule' or the 'rule in *Foss v. Harbottle*', after the case in which it was first definitively settled.

Foss v. Harbottle [1843] 2 Hare 461 (Vice-Chancellor's) Court, England)

> Two shareholders in the company brought an action against the company's directors and other persons. It was alleged that the property of the company had been misapplied and that certain transactions were entered into improperly. The Vice-chancellor held that the conduct with which the defendants were charged was not an injury to the plaintiffs exclusively; it was an injury to the corporation as a whole. The corporation and the members are not the same thing. Accordingly, the action could not be maintained by the plaintiffs.

Foss v. Harbottle established that the proper plaintiff in a suit for the enforcement of a corporate right is the company itself.

Counsel submitted there are exceptions to the 'proper plaintiff' rule both at common law and statute. Reference was again made to the same book at p. 325 which read:

> The 'proper plaintiff' aspect of the rule in *Foss v. Harbottle* does not apply where what is complained of is not a wrong to the company but an injury to a member personally. If a member's personal rights are infringed, he may sue for a personal remedy and the directors and majority members cannot stop him.

Counsel also referred to p. 327 of the same book where the learned writer said:

> lf a member chooses to sue the defendants in his own name to enforce the company's rights, this is known as a 'derivative action'. This is because the member is not suing to enforce his own rights, but that of the company's. Any right that he has 'derives' from that of the company. By the same token, any remedy that he obtains is for the company. A person bringing a derivative action cannot have any larger right of relief than the company itself. Although the action is brought in the name of the member, in reality it is the company's rights that are being litigated. As there is no procedure prescribed of a derivative action, it will take the form of a representative action. The company is added to the action as a nominal defendant so that it may be bound by the result.

Counsel then made reference to several exceptions which have developed to the rule in *Foss v. Harbottle* as set out by Edgar Joseph Jr J (as he then was) in *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881 at p. 1892:

> The rule was not applied universally; several exceptions developed, which were outlined by Jenkins LJ in *Edward v. Halliwell* thus at p. 1067:
>
> (1) *Ultra vires* acts: 'in cases where the acts complained of are wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority'.
>
> (2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others'.
>
> (3) Special majorities an individual member (is not) prevented from suing if the matter ... (is) one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority'.
>
> (4) Personal rights: Where 'the personal and individual rights of members of (the plaintiffs) have been invaded', the rule 'has no application at all'.
>
> (5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v. Newman Industries (No. 2).*

Counsel then explained the reason why this application was made *ex parte* is because the plaintiff has to act quickly under the circumstances as there is an immediate danger that the 1st defendant may dissipate the assets of the 2nd defendant and destroy relevant company documents. In his written skeletal

submission counsel had referred, amongst others, to the case of *Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng* [1947] 13 MLJ 174. In that case, the plaintiff and another company, both in voluntary liquidation, applied by their respective liquidators by motion for an order that an interim receiver be appointed of certain mining property in Kuala Lumpur. Willan CJ was of the view that in such an application, the court must be satisfied on two matters, namely:

(a) that the party applying for the receiver must have a *prima facie* interest in the property; and

(b) that the property must be in danger.

Counsel also made reference to the case of *In re Pountain* [1887] 37 Ch D 609 where it was held that in a proper case the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent will do so upon an *ex parte* application, and the case of *In re H's Estate* [1875] 1 Ch D 276 where it was held that where bankruptcy and consequent loss to a trust estate is expected, a receiver may be appointed before the service of the writ in an action. Counsel then pointed out that the 1st defendant is not a Malaysian citizen and in this context referred to the case of *Shaik Lebbai Maricar v. Haji Mohamed Eusope & Ors* [1929] SSLR 141 where it was held that the foreign residence of a trustee is a good ground for the appointment of a receiver.

In conclusion, counsel contended the facts as laid down in the plaintiff's affidavit in support show that there was no cooperation amongst the directors of the 2nd defendant and the relationship is not cordial and hence, this would necessitate the appointment of receivers and managers with a view to enable the 2nd defendant to carry out its obligations especially in relation to the said Telekom project. Reference was also to the case of *Hwang Ju-In v. Huang Han Chao* [1977] 2 MLJ 229. In that case the parties' partnership was dissolved in 1970 and since then the books of the partnership were retained by the respondent. There was little co-operation between the parties as a result of which the appellant applied for the appointment of a receiver and accounts to be taken. Choor Singh J found there was no co-operation at all between the parties and decided it was desirable that an independent third party such as the receiver take over the affairs of the partnership.

I had on 18 January 2001 allowed the *ex parte* application of the plaintiff and granted the order sought for, *viz.*, that the two said persons named therein be appointed as receivers and managers to receive and manage the affairs and properties of the 2nd defendant only in relation to the said Telekom project on the grounds that the plaintiff had shown to the court the following:

(i) that the plaintiff has a *prima facie* interest in the said works being carried out under the said Telekom project which is being undertaken by the 2nd defendant and which is still on going;

(ii) that the said Telekom project is in danger due to defaults in making payments to sub-contractors for works completed thereunder;

(iii) that there is little co-operation amongst the directors of the 2nd defendant which prevents its affairs being carried on properly; and

(iv) that it would be desirable that receivers and managers take over the affairs of the 2nd defendant in relation to the said Telekom project until the hearing of the originating summons.

On 23 January 2001, the 1st defendant, in response to the *ex parte* order that I granted to the plaintiff ("the said *ex parte* order"), filed an *ex parte* summons in chambers (encl. 11) praying for the following orders:

(i) that the said *ex parte* order be stayed until the same be heard *inter partes*; or

(ii) in the alternative, that the said *ex parte* order be struck off with costs and that encl. 5 be heard *inter partes*.

The grounds forwarded by the 1st defendant in his application are:

(a) that the plaintiff has failed to show that the 2nd defendant is in immediate danger and will be in a worse situation if the receivers and managers were not appointed

(b) that the plaintiff has failed to state the full facts and especially the fact that all cheques to be issued by the 2nd defendant would require the signatures of the directors appointed by the plaintiff; and

(c) that it is the plaintiff that caused the 2nd defendant to be in immediate danger as it has failed to pay its debts owing to the 2nd defendant.

Upon being informed of this *ex parte* application of the 1st defendant (encl. 11), which was accompanied by a certificate of urgency, on the day it was filed, *ie*, 23 January 2001, I instructed the deputy registrar to inform solicitors for the 1st defendant that encl. 11 has to be heard *inter partes* and that the relevant cause papers be served on the plaintiff. The 1st defendant has since filed an appeal to the Court of Appeal against this director. Be that as it may, encl. 11 was fixed for hearing on 31 January 2001. However on 31 January 2001, at the request of counsel for the 1st defendant, hearing of encl. 11 was adjourned to 9 February 2001. On 9 February 2001 hearing of

encl. 11 was again adjourned as both parties had filed further affidavits at the eleventh hour. Enclosure 11 was finally heard on 14 February 2001 and at the end of the day I reserved my decision to a date to be fixed.

At the outset of the hearing of encl. 11, counsel for the 1st defendant informed the court that he has decided to pursue only part of the second prayer to the application, namely, that the said *ex parte* order be struck out with costs. Upon being asked as to whether I would be in a position to set aside the said *ex parte* order, counsel for the 1st defendant answered in the affirmative and contended his application is made pursuant to O. 32 r. 6 of the rules which read "the court may set aside an order made *ex parte*". He then referred to the case of *Datuk M Kayveas v. PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 4 CLJ 544 at p. 550 where Mahadev Shankar JCA said:

> Notwithstanding s. 67 of the Courts of Judicature Act 1964, the proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is not to appeal but to apply to have it set aside by the judge who made it (see O. 13 r. 8, O. 14 r. 11, O. 19 r. 9, O. 32 r. 6 and O. 35 r. 2 of the RHC read with r. 14 of the Rules).

Counsel also referred to the Malaysian Court Practice High Court 1, a publication of the Malaya Law Journal, in relation to O. 32 r. 6 of the rules found at pp. 2255-2256 which read:

> [32.6.1.] Scope of the rule:
>
> This rule protects the basic right accorded to litigants, that a party who has not had an opportunity of being heard may apply to the court to discharge an order obtained in his absence (*Boyle v. Sacker* [1888] 39 Ch D 249 at 251).
>
> [32.6.2]: Setting aside an *ex parte* order:
>
> After issuing an *ex parte* order, a judge does not become *functus officio*. Under Order 28 r. 4(1) (originating summons procedure), the *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. An application to set aside an *ex parte* order is not an appeal so as to require a court of superior jurisdiction to deal with it; a court of coordinate jurisdiction may exercise the power; see *Lee Phet Boon v. Hoch Thai Finance Corp Bhd* [1994] 1 MLJ 448 and *Datuk M Kayveas v. PV Das (for himself and on behalf of People's Progressive Party of Malaysia)* [1997] 4 CLJ 544 CA.

Having submitted that the court has the power to set aside its own order made *ex parte*, counsel forwarded the following reasons as to why he made the application, *viz.*,:

(a) the said *ex parte* order obtained by the plaintiff is null and void on the following grounds:

(i) non-compliance of O. 30 r. 1 of rules;

(ii) breach of natural justice;

(b) the plaintiff has no *locus standi* to make the application.

On the issue of non-compliance of O. 30 r. 1 of the rules, counsel argued an application for the appointment of a receiver under O. 30 r. 1 must be made *inter partes*. He pointed out O. 30 r. 2 provides an application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such an order and O. 30 r. 3 provides that it is only where the applicant wishes to apply for the immediate grant of such injunction, that he may do so *ex parte* by summons.

Order 30 r. 4 provides the court hearing such an *ex parte* application may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons returnable on such date as the court may direct, to be issued. Thus, from his reading of O. 30, counsel contended any application for the appointment of a receiver under r. 1 of that order must be made *inter partes* and the said *ex parte* order which was obtained by the plaintiff on 18 January 2001 is null and void since the said rule was not adhered to.

On the issue of breach of natural justice, counsel contended O. 30 r. 1 was promulgated as to give the party against whom such an order is to be made a chance to be heard as the receiver, if appointed, will come into possession of the assets of that party and manage those assets. Without giving a charge to be heard to the party against whom such an order has been made is tantamount to a breach of natural justice.

On the issue of *locus standi*, counsel argued the plaintiff is a majority shareholder of the 2nd defendant, *viz.*, it holds 51% of the issued share capital. Being the majority shareholder, it cannot at all fail within the exceptions to the rule in *Foss v. Harbottle* referred to earlier as set out by Edgar Joseph Jr J in *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors*. As such, the plaintiff cannot claim that this is a derivative action as only a minority shareholder may bring such an action. Furthermore the plaintiff, for the purpose of this action, is relying on s. 132 of the Companies Act 1965 ("the Act") which is a provision dealing with liability of directors. Section 132(1) of the Act provides "A director shall at all times act honestly and use reasonable diligence

in the discharge of the duties of his office". Since the acts complained of in this action relates more to the liability of a director, ie, the 1st defendant, it is the company, ie, the 2nd defendant who should be bringing this action and not a shareholder, a majority one at that.

On the issue as to whether the court has the capacity to set aside its own order made *ex parte*, counsel for the plaintiff agreed with what has been submitted by counsel for the 1st defendant. I have mulled over the matter and I am satisfied that based upon what has been submitted, I have the power to set aside my own order made *ex parte*. I do not propose to delve further on this issue as this point is not in dispute.

In relation to his contention that an application for the appointment of a receiver made pursuant to O. 30 r. 1 of the rules must be made *inter partes*, counsel for the 1st defendant made reference to the case of *Bond Brewing Holdings Ltd & Ors v. National Australia Bank Ltd & Ors* [1989-1990] 1 ACSR 445. In that case, the appellants have appealed to the Supreme Court of Victoria against an order appointing receivers and managers made by Beach J on an *ex parte* application by the respondents and the same judge's refusal to vacate that order. ln allowing the appeal Kaye, Murphy and Brooking JJ held, *inter alia*, that:

(i) the appointment of a receiver, like any other equitable remedy, is to be had only where the remedies obtainable at law are inadequate to meet the ends of justice; the inadequecy of legal remedies is a condition for the proper exercise of equitable jurisdiction rather than the foundation of the jurisdiction itself;

(ii) there is no principle that a receiver may be appointed only on the application of a person who asserts some proprietary interest in the property concerned; what the applicant must show is that he has some legal or equitable right which will be protected or enforced by the making of the order sought and that no other available remedy is adequate

(iii) an *ex parte* application for a receiver should not be granted except in case of emergency; on such an application the court should consider whether an interlocutory injunction would suffice, and whether the usual undertaking as to damages should be required;

(iv) the respondents had acted unfairly by deliberately failing to give effective notice to the appellants and then seeking an oppressive order *ex parte*;

(v) an *ex parte* order of this kind should not have been expressed to operate pending further order;

(vi) if any relief was to be given under the circumstances, an interlocutory injunction would have been sufficient.

In their judgment the learned judges of the Supreme Court said (at pp. 456-457):

> The appointment of a receiver which is to be, so to speak, at the expense of the defendant's possession and without his consent is a step never to be taken without proper consideration of the defendants position. Where a receiver is sought, not merely of a particular asset of the defendant, but of all his assets, particular caution is required and where, as in the present case, the receiver is to possess himself of and to manage the assets and undertaking of a collection of companies which, whether they are solvent or not, are in a very large way of business, very great circumspection is required. Of course in a strong enough case the court might, without warning to a trading company, divest it of control of its undertaking and assets. But it must always be borne in mind that the appointment of a receiver in such a case authorises an irresistible invasion and that even if the army of occupation is withdrawn after only a short time things may never be the same again. Rights of property and the company's privacy are violated. Only the most pressing need can warrant such an invasion without notice. Quite apart from the taking out of the companies' hands of control of their assets and the management of their businesses, there was in the present case the added consideration (which will not infrequently be present where a receiver is appointed to a company) that the making of the order might well have most serious legal consequences for the companies or for related companies having regard to the terms of the securities given by them. And in addition to the legal consequences there was the commercial consideration that, as *Picarda, Receivers and Managers* p. 4 has observed, the receiver is often seen not as the company doctor but as the undertaker, so that a blow is struck to the standing and credit of the defendants.
>
> Applications for the appointment of a receiver made without any, or any, adequate, notice to the defendant, like applications for an interim injunction made in similar circumstances, are, or should be, granted sparingly. ... To return to the present case, the order was sought without effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings.

The learned judges then went on to state that since the order was sought without any effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings, under those circumstances it was necessary for the applicant to show he has a most powerful case of apprehended injury. The learned judges were of the view that *ex parte* applications for the appointment of a receiver ought not to be granted except in a case of emergency. The applicant must show that the circumstances are extraordinary and the court must determine whether a sufficient case of emergency has been shown to warrant the particular order

sought. The learned judges also observed that according to Fry LJ, in the practice of the court of Chancery, the *ex parte* appointment of a receiver is almost unknown (*Walbrook & Co v. Jones & Lewis* [1887] 3 TLR 609 at 610).

The learned judges went on to say (at p. 458):

> The drastic nature of the power to appoint a receiver is emphasised in the decisions mentioned in 65 *Amer Juris* 2d para 20, where authority is cited for the propositions that the power is a drastic, harsh and dangerous one and should be exercised with care and caution, that receivership is a drastic course allowed only under pressing circumstances and granted only with reluctance and caution and that the appointment of a receiver is an extraordinary drastic remedy, to be exercised with utmost care and caution and only where the court is satisfied there is imminent danger of loss if it is not to be exercised.

Counsel for the 1st defendant insisted that as an order for the appointment of receivers and managers made under O. 30 r. 1 of the rules would have no time frame, as opposed to an application for an injunction ancillary or incidental to an order appointing a receiver which may be made *ex parte* by summons and which by virtue of O. 29 r. 1(2B) of the rules would only have a life span of 21 days, the application for such appointment must be made *inter partes*. As such, he insisted that the said *ex parte* order granted to the plaintiff on 18 January 2001 is null and void as it was not made in accordance with the procedure set out under O. 30 r. 1 and that being the position, there has been a breach of the rules of natural justice as the 1st defendant was deprived of his right to be heard. Counsel argued O. 30 r. 1 was drafted in such a manner so as to give all parties which are going to be affected by such an order a right to be heard. Counsel then referred to the case of *Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586. That case relates to a charge action and the complain there was that the first respondent failed to notify the appellants of the date of the adjourned hearing. Counsel for the chargors had contended that the *ex parte* orders obtained in that case had been rendered null and void as there had been a breach of the rule of natural justice expressed in the maxim *audi alteram partem* reinforced by O. 83 r. 2(4) of the rules which provides:

> Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

> A copy of any affidavit served under this paragraph must be indorsed in accordance with para (3).

Edgar Joseph Jr FCJ held that the effect of that failure was of such fundamental importance as to render each and every one of the *ex parte* orders obtained a nullity. He said (at pp. 381-382):

> ... I consider that O. 83 r. 2(4) has a common law content. In other words, in my view, O. 82 r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. It is a familiar canon of statutory interpretation unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*.

It must be noted that O. 83 of the rules specifically deals with charge actions.

On the issue of *locus standi*, counsel for the 1st defendant contended only a minority shareholder is entitled to bring a derivative action and the plaintiff, being a majority shareholderhas no *locus standi* to do so. ln *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, which was referred to by both counsel in their submission, as to what is a derivative action, Gopal Sri Ram JCA said (at p. 427) it is:

> ... an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

On the issue of non-compliance of O. 30 r. 1 of the rules, to recapitulate, the plaintiff had begun this action by originating summons (encl. 1) claiming that it is bringing this action in its representative capacity and for the benefit of the 2nd defendant. Amongst the prayers sought for is a declaration that the 1st defendant has breached his fiduciary duty as a director of the 2nd

defendant. The plaintiff is also seeking injunctions to restrain the 1st defendant whether by himself or howsoever otherwise from signing and/or causing the signing of any cheques of the 2nd defendant and from disposing or dealing with any property of the 2nd defendant. Further, the plaintiff is seeking orders directing the 1st defendant to return all monies used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the 2nd defendant and to return all properties used and/or acquired by himself (if any) or third parties in breach of his fiduciary duty as a director of the 2nd defendant. The plaintiff has not included a prayer for the appointment of a receiver but has included a prayer for "such further and other orders as the court deems fit". I would now think that it being a substantial object of the action, a claim for such an appointment should have been indorsed in the originating summons itself. Be that as it may, as discussed earlier, *vide* an *ex parte* summons in chambers (encl. 5) the plaintiff applied for the appointment of receivers and managers pursuant to O. 30 r. 1(1) of the rules which provides an application for the appointment of a receiver may be made by summons or motion. O. 30 r. 1(2) provides "An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such an order". Order 30 r. 1(3) read together with r. 1(4) provides where the applicant wishes to apply for the immediate grant of such injunction, ie, an injunction ancillary or incidental to an order appointing a receiver, he may do so *ex parte* by summons supported by an affidavit and the court hearing an application under O. 30 r. 1(3) "may grant an injunction, restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property *until after the hearing of a summons for the appointment of the receiver* and may require such a summons returnable on such date as the court may direct, to be issued". From my reading, the words in italics above would denote that an application for the appointment of a receiver must be made *inter partes* and not *ex parte* as had been done in the instant case. Only applications for injunctions "ancillary or incidental to an order appointing a receiver" may be made by way of *ex parte* applications and the appointment of the receiver *per se* do not fall within the contemplation of those words. In encl. 5, besides applying for the appointment of receivers and managers, the plaintiff has also sought, *inter alia*, for an order, and which was granted, that the receiver be allowed "to take possession, control, custody and to get in to the business address and the registered office and any other offices of the defendant and to take possession, control custody of and to get in, receive and store all assets, properties and effects of business, monies, stock in trade, securities, deeds, books and documents in relation to the 2nd defendant". That order, without doubt, is injunctory in nature. It can only be granted as a consequence of a receiver being appointed, and since it is now my view that

the existence of the words *"until after the hearing of a summons for the appointment of the receiver"* in O. 30 r. 1(4) of the rules would denote that the receiver can only be appointed based upon an *inter partes* application, that injunctory order granted would not be able to stand by itself. Consequently, the other consequential orders granted also cannot stand.

On the whole I would tend to agree with the contention of counsel for the 1st defendant that an application for the appointment of a receiver under O. 30 r. 1(1) of the rules has to made *inter partes*. In *Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng* which was cited by counsel for the plaintiff, what is glaring in that case is that the application was heard *inter partes*. In that case the application to appoint an interim receiver was dismissed by the court on the grounds that the plaintiffs have not established a *prima facie* claim to title over the property in dispute and so the court would not be justified in appointing an interim receiver and turning the defendant out of possession. Furthermore, it had not proved that the property was in jeopardy. The circumstances present in *Hwang Ju-In v. Huang Han Chao* and *Shaik Lebbai Maricar v. Haji Mohamed Eusope & Ors*, referred to earlier, is also similar, namely, the applications were heard *inter partes*. In the case of *In re Pountain*, which was cited by counsel for the plaintiff, the court held in a proper case it will allow the appointment of an interim receiver upon an *ex parte* application if the case was urgent, but that case relates to an appointment of an interim receiver of the estate of a supposed lunatic. The circumstances present in the instant case is clearly different.

It is my view, from my reading of O. 30 r. 1 of the rules, that an application for the appointment of a receiver has to be made *inter partes*. Order 30 r. 1 do provide that the court may grant an interim injunction on an *ex parte* application to restrain the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property prior to the hearing of a summons for the appointment of the receiver but for the appointment itself, it is my view that it must be by way of an *inter partes* application. As observed by the learned judges in *Bond Brewing Holdings Ltd & Ors v. National Bank of Australia Ltd & Ors*, referred to earlier, in the practice of the court of Chancery, the *ex parte* appointment of a receiver is almost unknown. In that case the court frowned upon such an appointment based upon an *ex parte* application and held it should not be granted except in case of emergency The court was of the view that the applicant must show that the circumstances of his case are extraordinary. He should also show he has "a most powerful case of apprehended injury". On the whole, the court was of the view that such an order should be granted sparingly. Be that as it may, I am of the view that

an application for the appointment of a receiver made pursuant to O. 30 r. 1 of the rules must be made *inter partes*. I would agree with the contention of counsel for the 1st defendant on this issue and on this basis alone I would set aside the said *ex parte* order that I granted to the plaintiff on 18 January 2001.

In relation to the issue that there has been a breach of the rule of natural justice, counsel for the 1st defendant referred to the case of *Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor*. In that case, which relate to a charge action, O. 82 r. 2(4) of the rules provide that where the hearing of a charge action is adjourned, the plaintiff must serve notice of the appointment for the adjourned hearing on the defendant. The plaintiff omitted to do so and at the adjourned hearing, the matter was heard *ex parte* and order in terms of the originating summons including an order for sale pursuant to the provisions of the National Land Code was made. On appeal, the Federal Court held the *ex parte* orders obtained were a nullity. Edgar Joseph Jr FCJ said it is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*. In the instant case the application for the appointment of the receiver was made *vide* an *ex parte* summons-in-chambers. The plaintiff was of the view that such an application can be made on an *ex parte* basis and to date is holding on to that stand. Order 30 r. 1 of the rules do not specifically spell out that an application for the appointment of receiver has to be made *inter partes* but; as discussed earlier, the words "until after the hearing of a summons for the appointment of receiver" found in O. 30 r. 1(4) would, to me, denote that such an application has to be heard *inter partes* and thus, following what has been said in *Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor*, it is my view that the said *ex parte* order obtained by the plaintiff on 18 January 2001 is a nullity.

On the second contention raised by counsel for the 1st defendant, *viz*., that only a minority shareholder is entitled to bring a derivative action and the plaintiff, being a majority shareholder has no *locus standi* to do so, I would think that case-law seem to support this stand. In *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors*, the Court of Appeal stated that a derivative action "is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in it name". Such an action must meet the following requirements, namely:

(a) a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company;

(b) the wrongdoers must be cited as defendants;

(c) the company must also be cited as a defendant;

(d) the title to the action must reflect that the suit is being brought in a representative capacity;

(e) the statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so;

(f) there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant.

The above case seems to suggest that only a minority shareholder can bring such an action. The case of *Duffy v. Super Centre Development Corp Ltd* [1967] 1 NSWR 382 also suggest the same. In that case the Supreme Court of New South Wales appointed a receiver and manager of the assets and undertaking of a company pending the hearing of proceedings by minority shareholders against the majority shareholders over the development of a company project. In the instant case the plaintiff is the majority shareholder of the 2nd defendant and as such would be in the position to control the majority of the votes at a general meeting of the 2nd defendant. Two of the directors of the 2nd defendant were appointed by the plaintiff, the other two being appointed by Genisys, ie, the only other shareholder and which is holding 49% of the shares of the 2nd defendant. The facts as presented by the plaintiff suggest there is no co-operation between the parties. The main complaint of the plaintiff is clearly against the 1st defendant who is the managing director, or "chief executive officer"/"CEO" which seem to be the preferred nomenclature these days, who, pursuant to the said agreement, is in control of the day to day management of the 2nd defendant. I would think that whatever wrongdoing that has been committed by the 1st defendant could be raised as part of the agenda at a general meeting of the 2nd defendant. Steps or suggestions to protect any endangered property of the 2nd defendant can also be resolved by the wishes of the majority shareholder at a general meeting. The plaintiff complained the 1st defendant is not co-operative and is alleging he has breached his fiduciary duty as a director of the 2nd defendant. The plaintiff is seeking injunctions to restrain him from signing cheques and from disposing or dealing with any property of the 2nd defendant. It is also seeking orders directing the 1st defendant to return all monies and

properties used and/or acquired by himself, if any or third parties in breach of his fiduciary duty as a director of the 2nd defendant. I would think there are adequate remedies available to the plaintiff under the Act to overcome these complaints including the complaint that the 2nd defendant has not prepared its statement of accounts for the financial year ended 31 December 1999, thus breaching s. 169 of the Act. For example, under s. 144(1) of the Act the plaintiff, being a member holding not less than one-tenth of the paid-up capital of the 2nd defendant, may requisition for a general meeting and its directors, notwithstanding anything in its articles, must forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition. Section 144(3) of the Act provides if the directors do not within 21 days after the date of the deposit of the requisition proceed to convene the meeting, the requisitionists or any of them representing one-half of the total voting rights of all of them may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting. Section 145 of the Act provides two or more members holding not less than one-tenth of the issued share capital may call a meeting of the company. Consequently s. 132C(1) of the Act provides notwithstanding anything in a company's memorandum or articles the directors shall not carry into effect any proposal or execute any transaction for, *inter alia*, the disposal of a substantial portion of the company's undertaking or property which would materially and adversely affect the performance or financial position of the company unless the proposal or transaction has been approved by the company in general meeting. Section 132C(2) of the Act provides the court may, on the application of any member of the company, restrain the directors from entering into such a transaction. Section 132C(5) of the Act provides any director who contravenes the provision of this section shall be guilty of an offence against the Act.

As discussed earlier, the decision of the Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* seems to suggest that only a minority shareholder may bring an action on behalf of himself and all the other shareholders of a company in a derivative action. The plaintiff in the instant case is the majority shareholder. Although the wrongdoer as alleged by the plaintiff is the 1st defendant who, pursuant to the said agreement, is in control of the day to day management of the 2nd defendant, I would think that the proper party to bring an action to remedy the wrongs that he has allegedly committed would be the 2nd defendant. I do not think that the 1st defendant can ever prevent the 2nd defendant from bringing an action against his goodself if that is what has been decided at a general meeting of the 2nd defendant. Since the plaintiff, as the majority shareholder, control the votes,

it is *prima facie* in actual control of the 2nd defendant. It is the 2nd defendant which has to determine what steps it has to take against the 1st defendant to overcome or prevent the acts complained of against the 1st defendant. The plaintiff being the majority shareholder do not seem to fall within the contemplation of any of the exceptions to the rule in *Foss v. Harbottle* and hence would not be in a position to bring a derivative action.

For the reasons discussed above, I would set aside the said *ex parte* order granted on 18 January 2001 and order that the plaintiff pay the costs of this application to the 1st defendant.